IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.5099 OF 2005

Kishor Kirtilal Mehta : Petitioner

V/s.

The Asst. Charity Commissioner & Ors. : Respondents

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Mr.D.J.Khambata, Senior Advocate, with Mr.T.N. Tripathi for the petitioner.

Ms V. Mhaispurkar, Asstt. Govt. Pleader for the respondent nos.1 and 14.

Mr.R.A.Dada with Mr.Shyam Diwan, Senior Advocates, and Mr.Chetan Kapadia i/b. Nankani & Associates for the respondent nos.2 to 11.

Mr.K.L.Kharva for the respondent nos.12 and 13.

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CORAM : S.A. BOBDE, J.

October 3, 2005.

ORAL ORDER :

1. Rule, returnable forthwith.

The learned counsel for the respective respondents waive service of rule.

Heard by consent.

2. The petitioner has challenged the order dated 29th September, 2004 of the Asstt. Charity Commissioner addressed to the trustee, Lilavati Kirtilal Mehta Medical Trust, hereinafter referred to as the "Trust" to take appropriate steps since, in the opinion of the Asstt. Charity Commissioner, the petitioner cannot continue to be the trustee of the Trust. In pursuance of the aforesaid order, the trustees have on 6.10.2004 at 10 a.m. removed the petitioner from his position as a permanent trustee of the Trust. The impugned order is challenged primarily on the ground that it has had adverse civil consequences on the petitioner and has not been preceded by a notice to the petitioner to show cause against the impugned order.

3. The learned Asstt. Govt. Pleader appearing for the Asstt. Charity Commissioner does not dispute that there was no notice given to the petitioner before the aforesaid order was passed.

4. However, on behalf of the respondents, it is contended that what is impugned is not an order at all. It is a mere letter addressed to the Trust. It is difficult to accept this contention in view of the terms of the order which, though in the form of a letter, states as follows:-

> "In this circumstances, Mr.Kishore Mehta can not continue to be trustee of the above mentioned trust. You are therefore, directed to take appropriate steps in the matter and file compliance report of this office immediately."

The circumstances referred to are, inter alia, a complaint dated 21.9.2004 "of a serious nature" against the petitioner and the fact that the petitioner had left India without obtaining permission from an officer as required under the Bombay Public Trusts Act, 1950, hereinafter referred to as the "Act".

5. I am fortified in the view that the impugned order is indeed an order and had the desired effect in view of the way it has been understood by the Trust and what the Trust has done on that basis. The letter of the Advocate of the Trust dated 3.6.2005 addressed to the petitioner states that the petitioner has been removed in pursuance of the order dated 29.9.2004 passed by the Asstt. Charity Commissioner. In the meeting convened on 5.10.2004, the trustees have referred to the said order as a letter dated 29.9.2004 received from the Asstt. Charity Commissioner and have referred to the fact that the Asstt. Charity

Commissioner has observed that the petitioner has become "disqualified from the post of Trusteeship." In fact, the resolution also rejects the request of the petitioner's wife and son, who were present for sometime because "it was pertinent that the reply should be given immediately as otherwise the Office of Charity Commissioner can act against the Trustees at any time for not abiding with the directions of the office". The resolution further expresses the fear that the Charity Commissioner can prosecute all the trustees at any time. In fact, the meeting ended without a decision of expulsion of the petitioner. That expulsion took place on the next date in another meeting, minutes of which are at exh.'A' to the reply.

6. Mr.Khambata, the learned counsel for the petitioner, pointed out that the Asstt. Charity Commissioner seems to have exercised the power under section 47 of the Act which, inter alia, empowers the Charity Commissioner to remove a trustee where he is absent for a continuous period of six months from India without leave of the Charity Commissioner or the Asstt. Commissioner. Section 47 of the Act, to the extent relevant, reads as follows:-

"47. Power of Charity Commissioner to

appoint, suspend, remove or discharge trustees and to vest property to new trustees

(1) Any person interested in a public trust may apply to the Charity Commissioner for the appointment of a new trustee, where there is not trustee for such trust or the trust cannot be administered until the vacancy is filled, or for the suspension, removal, or discharge of a trustee, when a trustee of such trust,--

(a) .....

(b) is for a continuous period of six months absent from India without the leave of the Charity Commissioner or the Deputy or Assistant Charity Commissioner or the officer authorised by the State Government in this behalf;

(c) leaves India for the purpose of residing abroad."

7. Mr.Dada, the learned counsel for the respondent nos.2 to 11, however, contended that the impugned order is not under section 47. I am of view that whether it is expressly passed as an order under that section is not of much consequence since such a power is traceable only to section 47. If the contention on behalf of the Trust is to be accepted, then it makes matters worse since the order is completely without any authority of law and yet has the effect of an order passed under the guise of a statutory authority. The impugned order having admittedly been passed without hearing the petitioner is clearly void ab initio and amenable to interference by this Court in exercise of its jurisdiction under Article 226 and 227 of the Constitution of India (see Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 S.C.C. 107] in which the Supreme Cout observed as follows:-

> "The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition

> seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

I am of view that the present case attracts the applicability of the second contingency.

8. It is clear that the impugned order visits the petitioner with adverse civil consequences and is violative of the rules of natural justice. It is not innocuous and there was no reason for the Asstt. Charity Commissioner to ignore the fact that the order results in the petitioner's expulsion from the trust. In John v. Rees & Ors. [(1969) 2 All E.R. 274), an English Court emphasised the observance of the rules of natural justice in the following words:-

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say "why force everybody

> to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard. The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

I, therefore, have no doubt that the petitioner is entitled to feel resentment against the order without being afforded any opportunity "to influence the course of

events."

9. It was contended on behalf of the Trust that the change, viz., removal of the petitioner as a trustee has been reported to the Charity Commissioner under section 22 of the Act and the Charity Commissioner has inquired into the matter as required by the Act. The learned counsel for the petitioner submitted that the resolution of the Trust and the resultant change report being vitiated, those actions may be set aside by this Court. I am of view that it would not be appropriate to grant that leave to the petitioner in this case by reserving to the petitioner the right to participate in the inquiry and oppose the change report on merits. Even otherwise, the petitioner would be at liberty to resort to such appropriate proceedings in respect of his removal from the post.

10. In this view of the matter, the rule is made absolute in the following terms:-

The impugned order dated 29.9.2004 is set aside. Any proceedings which may be resorted to by the petitioner or the trust shall be decided on merits. All contentions of both the parties are left open. The respondent no.1

Asstt. Charity Commissioner is directed to decide the pending change report within a period of four months from the date the parties appear before him. The parties are directed to appear before the respondent no.1 on 28.10.2005.

Sd/-

S.A. BOBDE, J.